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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the

COURT OF CRIMINAL APPEALS

of the

STATE OF TEXAS

THE STATE OF TEXAS, Petitioner

v.

REX ALLEN NISBETT, Respondent

RESPONDENT'S BRIEF ON THE MERITS

FROM THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT OF TEXAS AT AUSTIN
IN CAUSE NUMBER 03-14-00402-CR

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v.

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

On March 21, 2013, Respondent was indicted for the felony offense of murder alleged to have been committed on December 14, 1991.[1] On June 11, 2014, a jury found Respondent guilty and assessed his punishment at forty-two years in prison.[2] On July 10, 2014, Respondent filed a Motion for New Trial in

[1] The two previous Williamson County District Attorneys reviewed this case and declined to prosecute because of a lack of evidence.

[2] This case was tried by Jana Duty, the former Williamson County District Attorney who has since been disciplined by the State Bar for her conduct in another capital murder case. This case was Ms. Duty's first felony trial.

which he argued that the State failed to prove any of the elements of the offense of murder. The motion was overruled by operation of law seventy-five days later. *See* TEX. R. APP. P. 21.8. On December 15, 2016, the Third Court of Appeals reversed Respondent's conviction and sentence and rendered an acquittal.[3] *Nisbett v. State*, No. 03-14-00402-CR (Tex. App.—Austin, delivered December 15, 2016) (not designated for publication).[4] The State did not file a Motion for Rehearing or a Motion for Reconsideration.[5] On January 18, 2017, the State Prosecuting Attorney's Office filed an Extension of Time to file Petition for Discretionary Review. The State Prosecuting Attorney's Office then filed a Petition for Discretionary Review on February 21, 2017.[6] Respondent timely filed a Response to the State Prosecuting Attorney's Petition for Discretionary Review on March 2, 2017. On July 26, 2017, this Court granted the State's Petition for Discretionary Review. After requesting and receiving an extension of time, the State Prosecuting

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[3] The opinion was authored by Justice Melissa Goodwin, a Board Certified Criminal Law Specialist and former Staff Attorney at the Court of Criminal Appeals.

[4] The Court of Appeals' opinion was unpublished and unanimous.

[5] The Williamson County District Attorney did not contact the State Prosecuting Attorney's Office. Rather, the State Prosecuting Attorney contacted the Williamson County District Attorney and inquired about this case. The elected District Attorney is a Board Certified Criminal Law Specialist and the Williamson County District Attorney's Office is staffed with an Appellate Division. The Williamson County District Attorney's Office chose not to pursue a Petition for Discretionary Review.

[6] The petition was transmitted on February 17, 2017 but was not accepted and filed by the Court until February 21, 2017.

Attorney filed its brief on September 13, 2017.[7] This Brief on the Merits in response is timely filed on or before October 13, 2017. *See* TEX. R. APP. P. 70.2.

STATEMENT OF FACTS

At trial, the State alleged that Appellant caused the death of his wife, Vicki Lynn Nisbett. In its brief, the State submits a rather dramatic rendition of the "facts" adduced at trial. However, the State's rendition frequently omits serious concessions by the State's own witnesses and testimony that there is no evidence that Vicki is deceased or that Respondent caused her death. That being the case, Respondent submits the following Statement of Facts for a more balanced review of the relevant evidence which was considered by the Court of Appeals.

Julie Tower, Vicki's co-worker, testified that she knew Vicki for approximately a year before she went "missing." (RR8: 65). On December 14, 1991, the two had plans to attend their company's Christmas party. (RR8: 65). Tower called Vicki at 2:30 p.m. and according to Tower, Vicki sounded upset because she and Respondent had been arguing. (RR8: 65-66). Tower heard Respondent and Vicki arguing and Vicki told Tower that Respondent had choked her. (RR8: 66). Tower called again at 5:30 p.m. and Respondent answered the phone. (RR8: 67). Tower told the jury that Respondent stated that Vicki had already left to go to the party or to go to her apartment. (RR8: 67). Tower called

[7] The State Prosecuting Attorney's brief was transmitted to the Court on September 11, 2017, but was not accepted and filed until September 13, 2013.

thirty minutes later and Respondent stated Vicki had gone straight to the party. (RR8: 67). The next day, Appellant called Tower and asked where Vicki was. (RR8: 68).

Wayne Castleberry told the jury that he met Vicki in 1991 at a nightclub and the two exchanged phone numbers. (RR8: 74-76). When he called her the next day, Respondent answered the phone. (RR8: 76). Castleberry spoke with Vicki the next day and they had lunch the following Monday. (RR8: 77). They kept in contact and on December 14, 1991, Castleberry spoke to Vicki on the phone once in the morning and once between 5:00 p.m. and 6:00 p.m. (RR8: 79). During the second phone call, a man picked up another phone and told Vicki to get off of the phone, which she did. (RR8: 80). Vicki was supposed to call him after the Christmas party but he never heard from her. (RR8: 80-81).

David Proctor testified that on December 16, 1991, he was a patrol deputy with the Williamson County Sheriff's Office and was dispatched to a missing persons call. (RR8: 87-88). Proctor spoke with Respondent who indicated Vicki was to have attended a Christmas party on December 14, 1991, while he watched their children, and she was to have returned the next day but never did. (RR8: 89). Respondent was "very forthcoming" in answering Proctor's questions and allowed Proctor to look around the apartment. (RR8: 96). Respondent stated that he and Vicki had been in an argument and that she had initiated a physical altercation so

he pushed her away. (RR8: 97). Respondent reported to Proctor that Vicki left the apartment shortly after and was depressed. (RR8: 97). On cross-examination, Proctor admitted that when Respondent allowed Proctor to search the apartment, Proctor never saw any blood or blood spatter. (RR8: 98-99).

Richard Elliott of the Williamson County Sheriff's Office related that on December 16, 1991, Respondent and a co-worker phoned the Sheriff's Office to report Vicki missing. (RR8: 115). Respondent voluntarily appeared at the Sheriff's Office and gave a statement in which he related that he was living with Vicki even though they were getting a divorce. (RR8: 120-21). Respondent acknowledged that he and Vicki had an argument on December 14, 1991, that he had pushed her away after she approached him, and that she left for a Christmas party that evening. (RR8: 121-22). Respondent thought that Vicki may have run off with another man since she had done that before. (RR8: 122). After Respondent moved out of the apartment he shared with Vicki, Elliott had the Department of Public Safety Crime Lab search for evidence inside the apartment. (RR8: 138-39). Pieces of carpet and sheetrock were collected. (RR8: 146). In February of 1992, Vicki's car was located in an HEB parking lot. (RR8: 149). On cross-examination, Elliott admitted that "Vicki's car" actually belonged to both Respondent and Vicki and that the evidence collected from Vicki's car had been lost over the years so it could not be tested for DNA. (RR8: 166-68). Elliott

admitted further that he did not seek a search warrant for Castleberry's car or home and did not conduct surveillance on anyone other than Respondent. (RR8: 169-70). Elliott acknowledged that he did not pull phone records for anyone other than Respondent. (RR8: 170). Elliott agreed that he never found a murder weapon, no body has ever been found, and that there are no eyewitnesses to any alleged crime. (RR8: 173-74).

Kelly Misfeldt told the jury that in December of 1991 he lived in the Lake Creek Parkway Apartments where Respondent and Vicki also lived. (RR9: 6). On December 29, 1991, Misfeldt saw Vicki outside of their apartments more than two weeks after she disappeared. (RR9: 8-9). Misfeldt remembered that Vicki was wearing a black jacket and black pants. (RR9: 11). Misfeldt saw Vicki's face and later, commented to Respondent that he saw that Vicki was back. (RR9: 12). Misfeldt learned that no one was aware that Vicki had returned so Respondent called the authorities to report what Misfeldt saw. (RR9: 12). Misfeldt gave a statement to the authorities the next day. (RR9: 12). In his statement, Misfeldt stated he was "99 percent sure that it was her." (RR9: 17). On cross-examination, Misfeldt clarified that he knew Vicki from meeting her several times before and was only thirty-five feet away from her when he saw her on December 29, 1991. (RR9: 18). Misfeldt related that an officer from the Sheriff's Office met with him later and tried to get him to change his statement. (RR9: 19-20).

Morris Smith told the jury that in December of 1991, he lived in the same apartment complex as Vicki and Appellant. (RR9: 26-28). Smith was asked about a time when Appellant borrowed his car, but could not remember so had to have his memory refreshed with his statement from January 9, 1992. (RR9: 29-32). Even after reading his statement, Smith did not recall when Appellant borrowed the car. (RR9: 32). Smith stated further that he did not "know a specific date… or when it was" that Appellant borrowed his car. (RR9: 37). On cross-examination, Smith admitted that his statement did not reflect that his car was damaged when Appellant returned it. (RR9: 42-43). Smith acknowledged that detectives searched his car a few days after Respondent borrowed it and found nothing suspicious. (RR9: 43).

Lana Faye Reed, Smith's sister, told the jury that in December of 1991, she lived with her brother at the apartment complex where Vicki and Appellant lived. (RR9: 51-52). Reed stated that on December 14, 1991, Smith babysat Vicki and Respondent's children for an hour to an hour and a half while Appellant borrowed Smith's car. (RR9: 52-56).

Robert James, a co-worker of Respondent's, stated to the jury that on one occasion he had a conversation with Respondent in which Respondent said that he had caught his wife cheating and thought about killing her, but that was not the Christian thing to do. (RR9: 70). On cross-examination, James admitted that no

one else was present when Respondent allegedly made this statement and that he did not remember where they were when the statement was made. (RR9: 72). James admitted further that he thought other people might feel the same way if they caught their wife cheating. (RR9: 72). James acknowledged that this was the only conversation he had with Respondent about his relationship with his wife. (RR9: 74-75).

Mark Johnson, Vicki's brother, told the jury that in getting to know Respondent, they went to Respondent's brother's property. (RR9: 84). According to Johnson, there were large holes dug on the property and Respondent said that you could bury a body on that property and no one would ever find it. (RR9: 85). Johnson also told the jury that Respondent said he would kill Vicki before he let her divorce him and take their children. (RR9: 85). On cross-examination, Johnson acknowledged that he never told Vicki what Respondent allegedly said because he did not take it seriously. (RR9: 94). Johnson also acknowledged that he never included the fact that there were holes on Respondent's brother's property in his statement to law enforcement. (RR9: 96-97).

Devane Clark testified that in 1992 he was employed with the DPS Crime Lab and went to Respondent and Vicki's apartment to collect evidence. (RR10: 8-10). Clark collected two samples of sheetrock from the home which appeared to be stained and did a presumptive test for blood, which was positive. (RR10: 16).

Clark also sprayed portions of carpet with luminal. (RR10: 22-23). He tested a portion of the carpet and pad and the results showed a stain on both was presumptive for blood. (RR10: 25-26). Clark also examined Vicki's car, but did not find any indication of blood in the car. (RR10: 43-44). On cross-examination, Clark admitted that luminal is only a presumptive test and that it reacts with other organic substances and minerals. (RR10: 53-54). Luminal does not indicate how any blood got on a specific surface and does not measure the volume of blood either. (RR10: 54). Clark acknowledged that luminal also does not indicate the origin of the presumptive blood or how long it has been there. (RR10: 54). Clark acknowledged further that he did not know whether Vicki was alive or not, or if she died, how she died or who may have killed her. (RR10: 81).

Oscar Kizzee testified that in 1992, he worked for DPS and examined a piece of sheetrock for latent fingerprints. (RR10: 123). Kizzee stated that the sheetrock appeared to have Respondent's palm print on it. (RR10: 135-36).

Detective Robert Kee testified that he was assigned to investigate this case in 2011 and through his review of the case, learned that Respondent had been interviewed a number of times, but never confessed to doing anything to Vicki. (RR11: 35). Investigators even attempted to have civilians try to get Respondent to confess, but he did not. (RR11: 34-35).

Megan Clement, a forensic scientist, told the jury that she tested a sample of carpet and compared blood found on the carpet to the DNA profiles of Vicki's mother and father and determined that the blood could not be excluded as originating from the biological child of Vicki's parents. (RR11: 49-50).

Heidi Prather told the jury that she is employed at the Missing Persons Clearing House. (RR11: 52). Prather told the jury that her organization is still actively looking for Vicki. (RR11: 66). On cross-examination, Prather admitted that she does not know if Vicki is dead or alive. (RR11: 68).

Jane Burgett, a forensic scientist with DPS, told the jury that she examined a piece of sheetrock that was collected in 1992 and found a mixture which indicated more than one DNA profile. (RR11: 127). Burgett could not exclude Respondent as a contributor to the mixture. (RR11: 137). Burgett then tested a sample of carpet that Clark had indicated a presumptive result for blood, but Burgett found neither a stain nor any blood on the sample. (RR11: 139). She examined another portion of the carpet and found a partial DNA profile of an unknown female. (RR11: 140). Burgett also tested a piece of carpet padding and though she found stains, none of them were blood. (RR11: 142). On cross-examination, Burgett agreed that she could not say how any DNA was left on an item of evidence or whether the contributor was dead or alive when the DNA was left. (RR11: 143). Burgett also agreed that a mixture of DNA profiles could occur when DNA is left

from two different people at two different times. (RR11: 144). In fact, DNA can come from several different sources including blood, semen, sweat, epithelial cells, saliva, mucous, and hair. (RR11: 145). Burgett stated that she expected to find mixtures of DNA where two people lived together. (RR11: 145-46). Burgett stated that Respondent could not be excluded as a contributor to the sheetrock sample which contained a handprint, but that statistically, she could not say that Appellant was the contributor of the DNA profile found on that sample beyond a reasonable degree of scientific certainty. (RR11: 149-50). Burgett acknowledged that as for the carpet sample, State's Exhibit 80, she tested several stains but none indicated the presence of blood. (RR11: 153-55). Portions of the carpet sample had previously been cut out and Burgett examined those, which were admitted as State's Exhibit 85. (RR11: 154). One of the stains contained human DNA, but was very difficult to see. (RR11: 157-58). Burgett clarified that the mixture of DNA profiles found on that stain was from two females. (RR11: 166). The other stain contained blood, but "was hard to see." (RR11: 160). Burgett stated that neither stain contained enough blood to indicate a person had died. (RR11: 160). Burgett could not testify that a crime occurred in this case or that Respondent committed an intentional act. (RR11: 170).

Dr. Arthur Eisenberg, a professor at University of North Texas, told the jury that he examined the carpet and padding collected from Vicki and Respondent's

apartment and determined that Respondent was not a contributor to the DNA found on the carpet or the padding. (RR12: 15-16). Eisenberg determined that the probability that Vicki was the contributor to the DNA on the carpet and the padding was over ninety-nine percent. (RR12: 17). On cross-examination, Eisenberg admitted he could not say that the contributor of the DNA on the carpet and padding was deceased. (RR12: 20). Likewise, he could not say that Respondent committed any crime based on his findings. (RR12: 20).

SUMMARY OF THE ARGUMENT

The evidence in this case is legally insufficient to support a conviction for murder under the long-held standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979) and adopted as the sole standard for determining legal sufficiency in Texas cases by this Court in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010). The Court of Appeals did not announce a new standard for reviewing legal sufficiency in murder cases. Rather, it is the State Prosecuting Attorney's Office that is asking this Court to adopt a new standard by replacing the statutory elements of the offense of murder with speculation and conjecture.

ARGUMENT

I. The State is required to prove beyond a reasonable doubt that a defendant intentionally and knowingly caused the death of an individual in a murder case and may not do so by speculation or conjecture.

The State Prosecuting Attorney's first ground for review states, "In the absence of a body, must the State prove a 'fatal act of violence' in order to convict someone of murder?" The simple answer to that question is: Yes. Texas law requires that the State prove beyond a reasonable doubt that a defendant intentionally or knowingly caused the death of an individual or committed an act clearly dangerous to human life which resulted in the death of an individual. *See* TEX. PENAL CODE § 19.02. In this case, the State failed to prove both that Vicki Nisbett is dead or that Respondent intentionally caused her death or committed an act dangerous to human life which caused her death.

The Court of Appeals did not announce a "novel" standard for review of murder cases by using the term "fatal act of violence" as the State Prosecuting Attorney argues. The Court simply reviewed all of the evidence to determine whether there was any evidence that Respondent committed an act that caused Vicki Nisbett's death and determined that there was not. Slip Op. at 25-27. Specifically, the Court of Appeals first determined that the State had not proven the *actus reus* of the offense. *Id*. The Court did so by following the United States Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979) and this

Court's decision in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010). Slip Op. at 3.

In a section of the opinion entitled "Requisites for Proving Murder," the Court of Appeals carefully acknowledged the requirement that the State prove both the *actus reus* of the offense and the *mens rea* of the offense. Slip Op. at 5-6. The State Prosecuting Attorney mischaracterizes the Court of Appeals' review of the facts of this case as an analysis of the manner and means of the alleged offense and asserts that the Court of Appeals strayed from this Court's holding that the State is not required to prove a manner and means of a death if it is unknown. Nothing could be further from the truth. The Court of Appeals explained:

> The State is entitled to indict a defendant alleging that the manner and means of how the offense was committed is unknown. *Stobaugh v. State*, 421 S.W.3d 787, 864 (Tex. App.—Fort Worth 2014, pet. ref'd); *see, e.g.*, *Moulton v. State*, 395 S.W.3d 804, 811–12 (Tex. Crim. App. 2013) (Cochran, J., concurring). The term "manner and means" refers to the *actus reus* of the crime, and the jury need not unanimously agree upon the manner and means. *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012); *see Jefferson v. State*, 189 S.W.3d 305, 316 (Tex. Crim. App. 2006) (Cochran, J., concurring) (observing that "manner and means" describes how offense was committed and is not element on which jury must be unanimous); *Ngo v. State*, 175 S.W.3d 738, 746 n.27 (Tex. Crim. App. 2005) (noting that jury must be unanimous on gravamen of offense of murder, which is causing death of person, but jury need not be unanimous on manner and means). So, here, the jury need only unanimously agree that appellant caused Vicki's death. *See Sanchez*, 376 S.W.3d at 774; *Ngo*, 175 S.W.3d at 746. But, what act—either an intentional or knowing act or an act clearly dangerous to human life—according to the evidence the State presented at trial, did appellant commit that caused Vicki's death? Appellant argues that "there is no evidence that Appellant committed

> an intentional act or an act clearly dangerous to human life which caused a death." After reviewing all the evidence presented by the State at trial, we are compelled to agree.

Slip Op. at 23-24.

The Court of Appeals carefully pointed out that the manner and means of an offense is separate from the *actus reus* of the offense. *See Id*. And while the State does not have to prove the manner and means if that is unknown, it is still required to prove that the alleged victim is actually dead and that the defendant caused the death. *Id*. In this case, the Court of Appeals did not so find and the evidence at trial does not so reflect. *Id*.

The State Prosecuting Attorney's argument that the Court of Appeals has announced a new standard in terming the phrase "fatal act of violence" in determining the *actus reus* of a crime is simply false. The Court of Appeals faithfully abided by this Court's precedent in analyzing the evidence in this case and determined that the evidence is legally insufficient to support a murder conviction because the State did not prove the *actus reus* of the crime. Clearly, the State is required to prove an act that caused the death of an individual to prove a murder case. *See* TEX. PENAL CODE § 19.02. There is no dispute about that fact among the Courts of Appeals nor did the Third Court of Appeals misapply that standard in the present case.

II. The Court of Appeals properly analyzed the evidence in this case.

The State's second ground for review is, "The court of appeals reviewed both the evidence and the elements of the offense in sequential, piecemeal fashion rather than cumulatively, and failed to respect the jury's prerogative to draw inferences and weigh testimony."

As a preliminary matter, whether the Court of Appeals reviewed the evidence in this case in a "sequential, piecemeal fashion" or in a cumulative manner, the result is the same. The State wholly failed to prove that Respondent caused the death of Vicki Nisbett or that Vicki Nisbett is even dead. State's witness after State's witness agreed that there is no evidence that Vicki Nisbett is dead or that an act occurred which caused her death as detailed in Respondent's argument below regarding sufficiency. Analyzing that fact as a whole or separately yields the same result.

Moreover, the opinion in this case is unpublished and does not conflict with any other Court of Appeals. Therefore, it has no precedential value and no import on the precedential jurisprudence of the State of Texas.

Further, Respondent disagrees that the Court of Appeals considered the evidence in this case in a "piecemeal fashion." The Court of Appeals thoughtfully and carefully reviewed all of the evidence and came to the conclusion that the evidence in this case, taken as a whole, is insufficient to support a murder

conviction. Specifically, the Court of Appeals stated:

> After reviewing all of the evidence in the light most favorable to the verdict, we hold that the ***cumulative force*** of all of the circumstantial evidence presented in this case and any reasonable inferences from that evidence merely raised suspicions of appellant's guilt and are insufficient to support a finding beyond a reasonable doubt that appellant committed the murder as alleged in the indictment.

Slip Op. at 38-39 (emphasis added).

Finally, the State Prosecuting Attorney argues that the Court of Appeals disregarded this Court's holding in *Carrizales v. State*, 414 S.W.3d 737 (Tex. Crim. App. 2013), which advises that a *Corpus Delicti* rule should not be utilized in a case where there is no extrajudicial confession. Again, nothing could be further from the truth. The Court of Appeals acknowledged the holding in *Carrizales* as follows:

> Without question, circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Carrizales*, 414 S.W.3d at 742; *Hooper*, 214 S.W.3d at 13. However, as the Court of Criminal Appeals has explained,
>
> > While juries are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial, "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15. "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id*. at 16. "A conclusion reached by speculation . . . is not

> sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id*.
>
> *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013); *see Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) ("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation."). Because the evidence in this case failed to establish either the *actus reas* or the *mens rea* of the charged murder offense, the State's circumstantial evidence was mere "suspicion linked to other suspicion." *See Hacker*, 389 S.W.3d at 874.

Slip Op. at 35-36. Despite what the State Prosecuting Attorney argues, the Court of Appeals acknowledged and followed *Carrizales*, but also adhered to this Court's line of cases that require more than mere speculation to prove a murder occurred. Asking simple questions such as "Is Vicki dead? Was it criminal? Is appellant responsible? What was his intent?" does not indicate the reliance on a *Corpus Delicti* rule, as the State Prosecuting Attorney suggests. Rather, they are simply the appropriate questions to ask when determining whether a murder has even occurred.

Additionally, the Court of Appeals did not misapply the holdings in *Hacker* and *Stobaugh* as alleged by the State Prosecuting Attorney. In fact, it is the State Prosecuting Attorney who is asking this Court to misapply the holding in *Stobaugh,* which held that "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions," by lowering the burden of proof in a murder case to just that which *Stobaugh*

precludes: mere speculation. *See Stobaugh v. State*, 421 S.W.3d 787, 862 (Tex. App.—Fort Worth, 2014).

The State Prosecuting Attorney is arguing essentially that motive, opportunity and suspicion are sufficient to support a murder conviction. If the State Prosecuting Attorney is seeking to lower the burden of proof in murder cases, it must do so at the Legislature, not through this Court. *See* TEX. PENAL CODE § 19.02.

III. The evidence is legally insufficient to support a conviction for murder in this case as found by a unanimous panel of the Third Court of Appeals.

The State Prosecuting Attorney's third ground for review reads, "Is the evidence sufficient to prove appellant murdered his wife?" The State Prosecuting Attorney acknowledges there are "some questions that remain unanswered" but insists that the evidence is sufficient to support Respondent's conviction based on speculation and motive. However, the "unanswered questions" that remain are:

1) Is Vicki Nisbett dead?
2) If Vicki Nisbett is dead, was her death the result of an intentional act or an act clearly dangerous to human life?
3) If Vicki Nisbett is dead, what was the *mens rea* of her killer?

These are questions which the State Prosecuting Attorney cannot, and has not, answered.

As discussed above, when reviewing the legal sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979); *Brooks v. State*, 323 S.W.3d 893, 896 (Tex. Crim. App. 2010).

In this case, the State failed to prove any of the elements of the offense. In fact, the majority of the State's witnesses agreed that there is no direct evidence against Respondent. For example, Richard Elliott, the lead detective in this case, agreed that he never found a murder weapon, no body has ever been found, and that there are no eyewitnesses to any alleged crime. (RR8: 173-74). Morris Smith, Respondent's neighbor, testified that detectives searched his car a few days after Respondent allegedly borrowed it and found nothing suspicious. (RR9: 43). Devane Clark, a Texas Department of Public Safety Crime Lab Technician who examined Vicki Nisbett's apartment testified that he did not know whether Vicki was alive or not, or if she died, how she died or who may have killed her. (RR10: 81).

Detective Robert Kee testified that he was assigned to investigate this case in 2011 and through his review of the case, learned that Respondent had been interviewed a number of times, but never confessed to doing anything to Vicki. (RR11: 35). Investigators even attempted to have civilians try to get Respondent

to confess, but he did not. (RR11: 34-35).

Heidi Prather of the Missing Persons Clearing House told the jury that her organization is still actively looking for Vicki and that she does not know if Vicki is dead or alive. (RR11: 66-68).

Texas Department of Public Safety DNA analyst Jane Burgett stated that the amount of blood found in Respondent's apartment was "very hard to see" and that there was not enough blood to indicate a person had died. (RR11: 160). Further, Burgett could not testify that a crime occurred in this case or that Respondent committed an intentional act. (RR11: 160, 170). The other DNA expert, Dr. Arthur Eisenberg, also stated he could not say that Respondent committed any crime based on his findings. (RR12: 20).

The record reflects that Respondent cooperated with the investigation into Vicki's disappearance and there is evidence she is not, in fact, deceased. Sheriff's Deputy David Proctor testified that Respondent was "very forthcoming" in answering his questions and allowed Proctor to look around the apartment. (RR8: 96). When Proctor searched Respondent's apartment, with Respondent's consent, Proctor never saw any blood or blood spatter. (RR8: 98-99). In addition, Kelly Misfeldt testified that on December 29, 1991, he saw Vicki outside of her apartment more than two weeks after she allegedly disappeared. (RR9: 8-9). Misfeldt specifically remembered that Vicki was wearing a black jacket and black

pants. (RR9: 11). Misfeldt was unequivocal that he saw Vicki's face and was "99 percent sure that it was her." (RR9: 17). Despite that fact, and the fact that Misfeldt has maintained his assertion that he saw Vicki for over twenty years, an officer from the Sheriff's Office met with him and tried to get him to change his statement. (RR9: 19-20).

Even the jury had questions about whether the State had proven its case. They deliberated for more than two days and had several questions. First, the jury sent out a question which read, "definition of reasonable inference" and "definition/clarification on intentionally and knowingly." (CR: 183). The jury sent another note which read, "We are split 7-5 and haven't changed decisions since 2. Some of us are getting tired and reasoning skills are not so great. Do we keep deliberating or take a break to sleep? What about possibility of hung jury?" (CR: 187). On the day they finally reached a verdict, June 11, 2014, the jury sent a note that said "Can we convict on a lesser charge than murder or is it the only option at this time?" (CR: 195). The same day, the jury sent a note that said, "We have come to an impass, we are still dead-locked at 7-5 and no new info or evidence is changing anyone's minds. What do we do?" (CR: 205). They received an "Allen Charge" on June 11, 2014 at 4:00 p.m. (CR: 206). The jury then found Respondent guilty of murder only a few hours later, presumably because they took the Court's supplemental charge as a directive to do so. (CR:

194).

The Court of Appeals stated it best when it related:

> The fundamental problem with the State's case here is that it presented no evidence to demonstrate that appellant engaged in any particular conduct or committed any specific act—an intentional or knowing act or an act clearly dangerous to human life—directed at Vicki that caused her death. Furthermore, because there is no evidence of a specific death-causing act, no facts exist in the record concerning appellant's conduct from which the jury could have reasonably inferred that appellant possessed the requisite mental state to support a conviction for murder.

Slip Op. at 38.

Nonetheless, the State Prosecuting Attorney ignores all of the testimony from the State's witnesses that the State failed to establish Vicki Nisbett is even deceased and summarily concludes:

> Appellant said he would kill his wife if she tried to leave him and take the kids. She left him and took the kids. Already unhappy about the pending divorce, he was more upset when he found out she began dating. It came to a head that day. Appellant did not want her to go out or to talk to her girlfriend, and he choked her after she spoke with the man she started dating. What exactly happened next is unknown, but she bled enough for it to soak through the closet carpet and cover appellant's hand (at least). He then borrowed a neighbor's car, jimmied the trunk lock, and brought it back after an hour and a half looking like it had driven through the woods.

See State Prosecuting Attorney's Brief at 36.

This is an interesting theory, but it is just that: a theory, not based in fact. On the contrary, the State Prosecuting Attorney fails to acknowledge that the person Appellant allegedly told he would kill Vicki if she tried to take his children,

Vicki's brother, never told anyone about this alleged threat because he did not take it seriously. (RR9: 94).

Further, the State Prosecuting Attorney acknowledges it is *unknown what happened to Vicki* but maintains she "bled enough for it to soak through the closet carpet and cover appellant's hand (at least)." This is incorrect. DPS Analyst Burgett testified that the blood samples she analyzed were so small, she could not see some of them and the stain submitted from the carpet contained the DNA of two females.[8] (RR11: 140, 157-60). Also, she could not exclude Respondent as a contributor to the sheetrock sample which contained a handprint, but statistically, she could not say that Respondent was the contributor of the DNA profile found on that sample beyond a reasonable degree of scientific certainty. (RR11: 149-50).

Also inaccurate is the State Prosecuting Attorney's assertion that Respondent "borrowed a neighbor's car, jimmied the trunk lock, and brought it back after an hour and a half looking like it had driven through the woods." Absent from this portion of the State Prosecuting Attorney's theory is the fact that at trial, Morris Smith could not remember Respondent borrowing his car and that according to his initial statement, detectives searched his car a few days after Respondent borrowed it, but found nothing suspicious. (RR9: 43).

[8] In fact, it is not known where each of the carpet samples came from because the State did not have Burgett identify each sample by exhibit number during her testimony.

Even if the State's theory was based in fact, this theory is simply not enough to support a murder conviction. The Texas Penal Code requires that the State prove beyond a reasonable doubt that a defendant intentionally caused the death of an individual or committed an act clearly dangerous to human life which caused the death of an individual. TEX. PENAL CODE § 19.02. This is impossible to do where the State has failed to prove the individual is dead.

Conspicuously absent from the State Prosecuting Attorney's analysis of the evidence is the testimony from Misfeldt that he saw Vicki Nisbett after she was reported missing and that a sheriff's deputy tried to get him to change his story about what he saw. (RR9: 11-12). The State Prosecuting Attorney also ignores the fact that the Missing Persons Clearing House is still actively looking for Vicki. (RR11: 66).

Nonetheless, the State Prosecuting Attorney concludes:

> Given the cumulative force of the surrounding circumstances—their rocky history, the violence earlier that day, the successful disposal of her body, and his attempts to further conceal his crime, to name a few—the evidence is sufficient to prove he caused Vicki's death intentionally or knowingly, or at least intended to cause serious bodily injury and committed an act clearly dangerous to human life.

State's Brief at 38.

The State Prosecuting Attorney's willful and intentional disregard for the statutory requirements for proving the offense of murder is no less than frightening. The State Prosecuting Attorney is asking this Court to substitute the

statutory elements of the offense of murder with speculation and facts invented by the State Prosecuting Attorney which include a "successful disposal" of Vicki's body. Moreover, the State Prosecuting Attorney glaringly concedes that it does not know what the *mens rea* of Vicki's alleged killer was.

In the end, the State Prosecuting Attorney has failed, as the State did at trial, to prove any of the elements of the offense of murder in this case. It cannot, and did not, show that Vicki Nisbett is dead, what caused her death, or that her death was a criminal act. As such, the evidence is legally insufficient to support Respondent's conviction and the Court of Appeals' decision acquitting him should stand. *See Jackson v. Virginia*, 443 U.S. 307, 320 (1979); *Brooks v. State*, 323 S.W.3d 893, 896 (Tex. Crim. App. 2010).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court of Criminal Appeals affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief on the Merits in Response to State's Petition for Discretionary Review was emailed to John Messinger, State Prosecuting Attorney's Office, on October 11, 2017.

/s/ Kristen Jernigan

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the foregoing document consists of 5,960 words in compliance with Texas Rule of Appellate Procedure 9.4.

/s/ Kristen Jernigan
Kristen Jernigan